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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

STEFONE F. KIRK,

Defendant and Appellant.

B241721

(Los Angeles County
Super. Ct. No. MA054691)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Richard E. Naranjo, Judge. Affirmed.

Jonathan B. Steiner and Suzan E. Hier, under appointment by the Court of Appeal,
for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney
General, Stephanie A. Miyoshi and William N. Frank, Deputy Attorneys General, for
Plaintiff and Respondent.

Stefone F. Kirk (Kirk) was sentenced to 31 years in state prison after he entered a plea of no contest to one count of arson of an inhabited structure and one count of assault by force likely to cause great bodily injury, and after he admitted to strike priors and inflicting great bodily injury on his fiancé, Bertha Curry (Curry). Kirk appeals on the grounds that he was coerced into accepting the People's plea offer by the trial court's statements, and by the prospect of Curry's instant release from jail where she was being held on a body attachment for refusing to testify.

We find no error and affirm.

FACTS

The charges

The Los Angeles County District Attorney filed an information charging Kirk with assault on Marissa Emond (Emond) on July 15, 2011, by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1) (count 1);¹ arson of an inhabited structure or property (§ 451, subd. (b)) (count 2); assault on Emond on July 29, 2011, by means likely to produce great bodily injury (§ 245, subd. (a)(1)) (count 3); first degree burglary of an inhabited dwelling (§ 459) (count 4);² assault on Curry³ by means likely to produce great bodily injury (§ 245, subd. (a)(1)) (count 5); making criminal threats to Curry (§ 422) (count 6); kidnapping Curry (§ 207, subd. (a)) (count 7); false imprisonment of Curry (§ 236) (count 8); committing mayhem upon Curry (§ 203) (count 9); felony

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² Kirk recounts the following facts as to Emond. "In July 2011, [Kirk] and [Emond] were seeing each other romantically. . . . On July 15, 2011, a security guard at a trailer complex extinguished a fire in Emond's trailer. . . . The fire had been in Emond's mother's room and had been set by [Kirk], who, while fighting with Emond that day, had told her to look in her mother's room."

³ At the preliminary hearing, Curry stated that she was in a continuing romantic relationship with Kirk. She also stated: "I plan to marry Mr. Kirk as soon as I am divorced." According to Kirk, these are the facts pertinent to the crimes against Curry. "Curry angered [Kirk] by asking about money that he owed her. He punched her in the face with his fist and squeezed her throat. She received nine stitches in the head as a result of the altercation."

dissuading Curry from reporting a crime on November 26, 2011, (§ 136.1, subd. (b)(1)) (count 10); felony vandalism (§ 594, subd. (a)) (count 11); and felony dissuading Curry from reporting a crime on November 29, 2011, (§ 136.1, subd. (b)(1)) (count 12).

With respect to count 5, it was further alleged that Kirk inflicted great bodily injury upon Curry, under circumstances involving domestic violence (§ 12022.7, subd. (e)). As to counts 1 through 12, it was alleged that Kirk had suffered two prior convictions of serious or violent felonies (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)); Kirk had served six prior prison terms without remaining free of prison custody for five years before committing a new offense that resulted in a felony conviction (§ 667.5, subd. (b)); and Kirk had suffered two prior convictions of a serious felony (§ 667, subd. (a)(1)).

The plea bargain

On March 26, 2012, the prosecutor, Kirk and his public defender convened for a hearing. The trial court told Kirk: “There has been some talk . . . about settlement of the case. The [district attorney’s] office wanted you to make a counteroffer. It’s charged as a 25-to-life case. Your attorney and [the prosecutor] spoke. I sent [the prosecutor] upstairs to talk to the head deputy at the district attorney’s office to find out what they would accept. Just to cut to the chase, what would they accept to settle the case short of going to trial[?]”

The trial court explained to Kirk that if he went to trial and was found guilty on all counts, and if each of the allegations were found true, his sentence would be 319 years to life.⁴ Kirk was told, “Basically you would die in prison.” The trial court advised Kirk that the outcome was far from certain because it was possible that he might prevail on some of the counts and allegations, and because his attorney would make a *Romero* motion⁵ to have the strike allegations stricken. But as to the anticipated *Romero* motion, the trial court stated that it was “not looking good for those strikes to be struck.” At that

⁴ The trial court originally said the potential sentence would be 225 years eight months to life. Prompted by the prosecutor, the trial court changed its calculation.

⁵ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

point, the trial court told Kirk that the district attorney's office was offering 31 years. However, the offer would be withdrawn when jury selection began.

Continuing on, the trial court stated: "All right. So what I would really like you to do, sir, is I want you to think and think hard about this. . . . [The] numbers . . . being thrown at you . . . are staggering. I mean, 300 to life is meaningless because you won't [live] that long obviously. . . . So it's basically a death sentence. . . . If the jury convicts you on these charges and finds the strikes true and finds the allegations true, my hands are pretty much tied as to what I can do. So if that all happened that way, I would have to sentence you that way, which is basically a death sentence, without saying the word 'execution' because you will die in prison. . . . Nobody likes the idea of accepting a 31-year deal, but you're talking about a fixed term." After Kirk served 85 percent of his sentence, he would be eligible for parole, meaning that he could get out in 26 years four months as long as he did not have any problems in state prison. The trial court ended its comments by stating, "I want to make sure the numbers are all here in front of you so you know exactly what you're saying yes or no to. And whatever you choose to do is whatever you choose to do. I'm here. I'll be doing this trial, if we have a trial. I'll be doing a different trial if we're not going to do a trial here. It's doesn't matter to me [except] . . . that I would not be happy to have to sentence you to 319 years to life, but I will do my job when presented it."

The prosecutor explained to Kirk that he was facing a minimum of 25 years to life if he was convicted on one count alone. After that, the trial court sent Kirk to speak with his public defender. Kirk came back to the courtroom and said, "I'll go ahead with the trial." The trial court said "that's fine and dandy. That's what we'll do."

The trial court spoke to counsel and Kirk about some trial issues. Following a recess, the public defender said Kirk was considering the deal.

Before entering the plea, Kirk asked if he could get a lower offer. The trial court said that the offer was up to the prosecution, and that Kirk had to decide whether to accept the offer that was on the table. Kirk asked if Curry—who was in jail due to a body

attachment because she was a defaulting witness—would be released. The trial court stated, “Based on your plea and being sentenced today, yes, she will.” Kirk said, “Okay.”

Kirk was asked if he was entering the plea deal because he thought it was in his best interests. He replied, “Not really, but I just don’t want [Curry] in jail.” The trial court explained that it could not take Kirk’s plea if he was accepting the deal only to secure Curry’s release. It added, “[Y]ou have to believe that you’re doing it because in lieu of facing potentially 319 years to life as well as her getting released from custody, this 31 years is something you want to take because you think it’s in your best interest.” Kirk stated that he was “not really worried about the 300. I just don’t want her in jail.” At that point, the trial court said it could not accept Kirk’s plea if he was entering it “strictly to get [Curry] out of custody[,]” but it could accept the plea if “you’re telling me you’re doing it because in the grand scheme of things when you consider everything, you think it’s in your best interest to take the deal[.]” Kirk said, “I don’t really care about the deal. I just don’t want [Curry] in jail.” The trial court said Curry would get out “today” if Kirk accepted the deal. But it did not want that to be the basis of Kirk’s plea. The trial court explained that it “wouldn’t be a proper voluntarily, intelligent and knowing waiver. That would be semi-coercive.” Kirk said that getting Curry out of jail was the only reason he would take the deal. In response, the trial court stated that it would not accept a plea. Kirk expressed surprise.

The public defender said, “No. You have to do it because you feel it’s in your best interest. You can’t look at it as a contingent matter of [Curry] being in custody. If you want to resolve it because you’re looking at 319—to resolve for a determinate sentence of 31 years so that you will have a time you will be released. You can’t factor in whether or not she’s going to get out.”

Kirk said, “That’s my best interest then.”

The trial court stated: “If you’re considering everything . . . and you’re telling me you’re taking it because you believe it’s in your best interest all around, her getting out, you getting the 31 years fixed, as opposed to potentially 25 to life on the one count or 319

to life on all counts, if you're telling me you're doing it because you believe it's in your best interest, fine. We got a deal."

In response, Kirk said, "Yeah. That's what I'm doing."

The prosecutor informed Kirk of the consequences of his plea. He was advised of and waived his rights. Kirk entered a plea as agreed. He pleaded no contest to counts 2 and 5 for arson and assault. In addition, he admitted that he inflicted great bodily injury during the assault on Curry, that he previously suffered a prior conviction under the Three Strikes Law, and that he had two prior convictions for a serious felony within the meaning of section 667, subdivision (a).

Defense counsel joined in the waivers and plea, and stipulated to a factual basis based on the police report and charging document. The trial court found that Kirk "knowingly and intelligently waived his rights to a trial understanding the consequences of the admission, of his prior convictions, and the plea of no contest to count[] 2 and count 5, as well as the great bodily injury admission and the strike admission and the two five-year priors."

Kirk was sentenced to 31 years in state prison.

The prosecutor said, "Can we just put on the record—Mr. Kirk, you understand you entered this plea not based on anything that's happening to Ms. Curry, but based on the fact in light of all of the circumstances, you feel it's in your best interests to do so to enter the plea agreement; is that correct, sir?"

The trial court did not allow Kirk to answer. It averred: ". . . I already stated very specifically on the record that he was doing it because of the totality of everything, including Ms. Curry. First he was basing it only on Ms. Curry getting out that he wanted to take the deal and I said no, it has to be based on everything. When you consider the 319 years, the fixed-term offer, and her release, considering everything—you can't look at it individually—when considering everything, are you taking it because you believe it's in your best interest to do so and I think he said it twice, if not three times." When the prosecutor said he just wanted to be clear, the trial court said, "We're not going to beat a dead horse."

The appeal; the certificate of probable cause

Kirk filed an appeal. He requested a certificate of probable cause based upon the claim that he was coerced into pleading guilty. The trial court issued a certificate of probable cause.

DISCUSSION

I. Standard of Review.

Whether a no contest plea was voluntarily and intelligently made is subject to de novo review on appeal. (*People v. Aparicio* (1999) 74 Cal.App.4th 286, 289; *People v. Mosby* (2004) 33 Cal.4th 353, 360–361 (*Mosby*) [reviewing an admission that a defendant suffered a prior felony conviction]; *U. S. v. Kaczynski* (9th Cir. 2001) 239 F.3d 1108, 1114 (*Kaczynski*).) However, the trial court’s factual findings must prevail if they are supported by substantial evidence. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254 [reviewing the denial of a motion to withdraw plea on the grounds that the plea was not voluntary due to intoxication; the trial court’s observation of the defendant supported its conclusion that he was not intoxicated]; *Kaczynski, supra*, 239 F.3d at p. 1114 [factual findings reviewed for clear error].)

II. The Trial Court did not Coerce Kirk.

Kirk argues that the trial court’s statements coerced his acquiescence to the plea bargain. We cannot concur.

A guilty plea “‘obtained through “coercion, terror, inducements, subtle or blatant threats” [is] involuntary and violative of due process. [Citations.]’” (*People v. Sandoval* (2006) 140 Cal.App.4th 111, 124 (*Sandoval*).) There is a risk that a judge’s participation in plea discussions might coerce a defendant into accepting a plea bargain. (*People v. Williams* (1969) 269 Cal.App.2d 879, 884.) For example, when a judge “abandons its judicial role and thrusts itself to the center of the negotiation process and makes repeated comments that suggest a less-than-neutral attitude about the case or the defendant, then great pressure exists for the defendant to accede to the court’s wishes.” (*People v. Weaver* (2004) 118 Cal.App.4th 131, 150.) But there is no rule in California prohibiting judicial involvement in plea negotiations. (*Id.* at p. 148.)

The trial court was neutral in its comments to Kirk. It laid out Kirk's exposure in realistic terms. Indeed, Kirk does not suggest that the trial court exaggerated the potential exposure when it said Kirk was facing 319 years to life. Without prejudging a potential *Romero* motion, the trial court indicated that if a jury found Kirk guilty, then he should be aware that the objective factors for striking a strike under *Romero* did not appear to be in Kirk's favor. Not once did the trial court express an opinion regarding Kirk personally or his likelihood of prevailing on the merits. Nor did the trial court advocate the plea bargain as in Kirk's best interest. Rather, the trial court acknowledged that the result of trial was not certain, and that whatever Kirk chose would not matter to the trial court one way or the other. When Kirk said he wanted to go to trial, the trial court did not try to change his mind. Instead, it said "that's fine and dandy. That's what we'll do." Not once did the trial court suggest that it was disappointed that Kirk was rejecting the deal. The record indicates that Kirk later changed his mind without any involvement from the trial court. Then, after Kirk indicated he was taking the deal so that Curry would be released, the trial court merely informed Kirk that it could not accept a plea under that scenario. The trial court advised Kirk that he had to enter a plea because he believed it was in his best interest.

Significantly, Kirk's public defender advised him and then joined in the waiver of rights. This suggests that the plea bargain was fair based on facts known to the public defender. Also, as a result of Kirk's alleged strike priors—including six prior convictions for purposes of section 667.5—it is easy to infer that he was not new to the criminal justice system and was not intimidated by it. Bolstering that conclusion is the record of Kirk's repeated requests to go to trial. It is readily apparent that he was not bowing to any pressure. Further, the second and concluding round of colloquy between the trial court and Kirk was initiated by Kirk. All these facts suggest that he was not coerced into accepting the plea bargain.

To support his claim of coercion, Kirk states that the trial court took a big role in getting the prosecution to make a plea offer because it sent the prosecutor to speak to his superiors about what it would take to settle the case. By implication, Kirk seems to

suggest that the trial court was the driving force behind the plea bargain. But all the record shows is that the prosecutor and public defender were talking about settlement, the prosecutor asked for a counteroffer, and only then did the trial court send the prosecutor to speak to his superiors. In any event, we fail to see the relevance. Nothing about the trial court's conduct was coercive. It never pushed for a deal or advocated it. And what the trial court did is a common occurrence every day in every courthouse around the country. When settlement is a possibility, judges always ask lawyers to consult their clients or superiors, as the case may be.

Kirk complains that the trial court told him that if he was convicted, he could possibly receive a large sentence and would die in prison. That statement, however, was accurate. And it was not coercive. Kirk also complains about the trial court's comments about a potential *Romero* motion. But he does not suggest that the trial court's statement was false under the law. Next, he suggests that it was improper for the trial court to point out that he could possibly get parole in about 26 years, that the trial court would not be happy to sentence him to 319 years to life in state prison, that Kirk should consult with the public defender, and that the minimum he faced was 25 years to life if he was convicted on just one count. We perceive no impropriety. Each of the trial court's statements was neutral and proper.

The trial court asked Kirk to think about the plea bargain, reminded him that the plea deal would expire when jury selection began and then gave him the opportunity to discuss it with the public defender. He tells us that these statements added pressure on him to enter the offered plea. In a sense, that is true. But the pressure came from the existing facts and Kirk's best interest, not the trial court. In other words, the trial court simply let the facts speak for themselves. As a side note, it cannot be ignored that Kirk was represented by a public defender. Because the public defender joined in the waivers, there is a strong inference that Kirk's attorney told him the same version of facts that Kirk heard from the trial court. We easily infer that the trial court was not the only source of information Kirk received.

Last, Kirk claims that the trial court's statements made it clear that it wanted him to take the plea bargain, and that it therefore exerted psychological pressure on him to accede. This argument misses the mark. The trial court was assiduously careful not to express a preference for what Kirk did.

III. Curry's Prospective Release from Jail did not Coerce Kirk.

Kirk contends that his plea was involuntary based on an analogy to the law of package-deal pleas. This contention lacks merit.

Coercion is "a particular danger in the package-deal plea bargain context." (*Sandoval, supra*, 140 Cal.App.4th at pp. 124–125.) Such deals "may approach the line of unreasonableness. Extraneous factors not related to the case or the prosecutor's business may be brought into play. For example, a defendant may fear that his wife will be prosecuted and convicted if he does not plead guilty; or, a defendant may fear, as alleged in this case, that his codefendant will attack him if he does not plead guilty. Because such considerations do not bear any direct relation to whether the defendant himself is guilty, special scrutiny must be employed to ensure a voluntary plea. '[P]lea bargaining of adverse or lenient treatment for some person *other* than the accused . . . might pose a greater danger of inducing a false guilty plea' [Citation.]" (*In re Ibarra* (1983) 34 Cal.3d 277, 287 (*Ibarra*) [in a package-deal, the defendant was allowed to plead guilty to a lesser crime and receive a lesser sentence, contingent upon a guilty plea by all codefendants].) Due to the danger, the trial court must "conduct an inquiry into the *totality of the circumstances* to determine whether, in fact, a plea has been unduly coerced, or is instead freely and voluntarily given." (*Id.* at p. 288.)

During its inquiry, the trial court should ensure that the prosecutor has not misrepresented the facts, and that the substance of the inducement is within the proper scope of the prosecutor's business. (*Ibarra, supra*, 34 Cal.3d at pp. 288–289.) "The prosecutor must also have a reasonable and good faith case against the third parties to whom leniency is promised." (*Id.* at p. 289.) "If the guilty plea is not supported by the evidence, it is less likely that the plea was the product of the accused's free will. The same would be true if the 'bargained-for' sentence were disproportionate to the accused's

culpability.” (*Ibid.*) The “nature and degree of coerciveness should be carefully examined. Psychological pressures sufficient to indicate an involuntary plea might be present if the third party promised leniency is a close friend or family member whom the defendant feels compelled to help. ‘[T]he voluntariness of a plea bargain which contemplates special concessions to another—especially a sibling or a loved one—bears particular scrutiny by a trial or reviewing court conscious of the psychological pressures upon an accused such a situation creates.’ [Citation.]” (*Ibid.*) But “a plea is not coerced if the promise of leniency to a third party was an insignificant consideration by a defendant in his choice to plead guilty. For example, if the motivating factor to plead guilty was the realization of the likelihood of conviction at trial, the defendant cannot be said to have been ‘forced’ into pleading guilty, unless the coercive factors present had nevertheless remained a *substantial factor* in his decision. [Citations.]” (*Id.* at pp. 289–290.) Other factors can be considered such as the “age of the defendant [citation], whether defendant or the prosecutor had initiated the plea negotiations [citation], and whether charges have already been pressed against a third party [citation] might be important considerations.” (*Id.* at p. 290.)

Kirk does not explain why his plea bargain was a package-deal, or why package-deal law should apply. His plea bargain was not contingent upon a codefendant entering a plea. There was no codefendant. Nor did the prosecutor make a promise that it would not prosecute Curry. Even assuming that this was a package-deal plea bargain, or that *Ibarra* otherwise applies, substantial evidence establishes that Curry’s release was not a significant consideration for Kirk.

The trial court explained that it would not accept a plea unless Kirk was entering a plea for his own best interest. Kirk said three times that his best interest was served by entering a plea.

Kirk was facing a possibility of 319 years to life in state prison. A review of the preliminary hearing indicates a factual basis for the charged offenses, and the offer of 31 years was not disproportionate to the charged offenses and alleged enhancements. As the trial court explained, Kirk could be eligible for parole after 26 years. Thus, the nature of

the plea bargain was fair. In addition, he was born in 1970, which means he was nearly 42 years old at the time of the plea. It was alleged that he had six prior convictions for which he served prison terms. He was not a naive young man. Rather, he was experienced in the criminal justice system. (*Mosby, supra*, 33 Cal.4th at p. 365 [a defendant's experience with the criminal justice system is relevant to the question of whether he knowingly waived constitutional rights].) This suggests he understood the severity of his exposure, and also that if he took the plea bargain, he could be released while in his 70's. It also suggests that he realized the likelihood of conviction on at least one count. With the strike priors, a single conviction would have resulted in a minimum sentence of 25 years to life.

It is true that Kirk initially stated Curry's release was his main concern. But he changed his mind. It is also true that Kirk essentially said that Curry's release played a part in his overall best interest. But in our view, Curry's release was not a substantial factor. She was in jail on a body attachment, and that was only to secure her testimony. It was not a punishment. No matter what, she was going to be released, at least when the case was over. Based on the prosecutor's trial estimate of seven to nine days, she would not have been in jail long. And it was possible that she would have been released earlier. The trial court explained: "I'll have a bail hearing on her. I'll listen to all the facts about why she's in custody and make a decision as to whether she stays or not. That's if we go forward with the case." The inference is that Kirk's exposure of 319 years to life in prison rather than saving Curry from a brief stay in jail was the driving force behind his plea.

Upon review, we are satisfied that the evidence supported the trial court's conclusion that the plea was voluntary.

DISPOSITION

The judgment is affirmed.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.*
FERNES

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.